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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 13, 2000

BY HAND

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20054

EX PARTE PRESENTATION

Re: CC Dkt. No. 96-98

Dear Ms. Salas:

Today, David Scott, President and CEO of Birch Telecom, Inc., Richard Burk, President and CEO of nii communications, Joseph Gillan, representing the PACE Coalition, and Jacob Farber of this law firm met with Commissioner Furchtgott-Roth and Rebecca Beynon, the Commissioner's Legal Advisor, Common Carrier Matters. We discussed the need for an elimination or reduction of the restriction on the availability of switching as an unbundled network element in density zone 1 of the top 50 MSAs. We reiterated the positions taken in the petition for reconsideration filed by Birch Telecom and the subsequent ex parte letters filed by the PACE Coalition in this docket. We distributed the attached material.

If you need any further information or have any questions, please do not hesitate to give me a call.

Sincerely,

Jacob Farber

cc: Commissioner Furchtgott-Roth w/o encl.
Rebecca Beynon w/o encl.

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SEP 13 2000
FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98

PETITION FOR PARTIAL RECONSIDERATION

Birch Telecom, Inc. ("Birch") respectfully petitions for partial reconsideration of the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, released November 5, 1999, in the above-captioned docket (the "*Third Report and Order*").

Birch is a competitive local exchange carrier ("CLEC") serving primarily residential and small- and medium-sized business customers in Texas, Missouri, and Kansas. While Birch has deployed its own switches in Saint Louis, Missouri; Kansas City, Missouri; and Wichita, Kansas, it relies on the UNE-Platform[1] to provide service to a significant portion of its customers. Indeed, even in the areas where Birch has deployed its own switch, it is more efficient for Birch to serve many or most residences and small business through the UNE-Platform. The widespread and unfettered availability of unbundled switching is thus critical to Birch's business strategy and to the spread of competition in the residential and small business markets.

[1] The UNE-Platform is the combination of unbundled switching and local loops and the other UNEs necessary to provide end-to-end retail service to a customer.

Birch is committed to serving small business and residential customers. In order to ensure that Birch and other CLECs can continue to expand into those markets, Birch asks that the Commission reconsider two aspects of the *Third Report and Order* affecting the availability of the local circuit switching unbundled network element ("UNE"). First, Birch requests that the Commission reconsider its determination that local switching be made available in the top 50 markets only for service to residential and small business customers with three lines or less. As shown below, that cap leaves a significant gap between the residential and three line or less small business customers that can be served through unbundled switching and the medium and large business customers that it is efficient to serve through self-provisioned switching. By increasing the maximum number of lines that can provided through unbundled switching to the DS-1 level, the Commission will go a long way to closing that gap and ensuring that small businesses are able to reap the benefits of competition in the local exchange market.

Second, Birch requests that the Commission clarify that the cap on the number of lines available for serving a customer applies only at the time when a CLEC initially puts a customer into service; once the customer is established, the cap does not preclude a CLEC from continuing to serve a customer through unbundled switching if the customer's needs grow beyond the cap.

BACKGROUND

In the *Third Report and Order*, the Commission held that, generally, CLECs would be impaired in their ability to provide service if local circuit switching is not available as a UNE. *Third Report and Order*, ¶ 253. In so holding, the Commission found that "the costs of self-provisioning switching . . . materially diminish a requesting carrier's ability to provide the services it seeks to offer." *Id.*, ¶ 262. The Commission found that the relevant costs of self-provisioned switching include the costs of the switch itself, the costs of establishing collocation arrangements with incumbent LECs, and the costs associated with the coordinated cutover process. *Id.*, ¶¶ 262, 263, 265. The Commission also found that the delays inherent in serving customers with self-provisioned switching further impaired the ability of a CLEC's ability to provide the services it seeks to offer. *Id.*, ¶ 267. The Commission therefore included circuit switching on its national list of UNEs that incumbent LECs must make available on an unbundled basis to CLECs. *Id.*

The Commission, however, adopted an exception to the general rule that local circuit switching must be made available as a UNE. Incumbent LECs are not required to provide local switching as a UNE for end users within density zone 1 in the top 50 MSAs where they are providing nondiscriminatory, cost-based access to enhanced extended links ("EELs"). The Commission found that in those geographic areas, CLECs had installed a sufficient number of switches to suggest that requesting carriers are not impaired without access to unbundled local circuit switching. *Id.*, ¶ 278.

Recognizing that even where CLECs are providing switch-based service, they have focused mostly on the medium and large business markets, the Commission found that CLECs would be impaired in providing service to residential and small business customers if unbundled switching were not available to serve those latter customers. *Id.*, ¶ 291. The Commission therefore limited the exception to switching to customers with four or more lines. *Id.*, ¶ 293.

ARGUMENT

I. THE MAXIMUM NUMBER OF LINES SHOULD BE INCREASED FROM 3 LINES TO THE DS-1 LEVEL

A. Residential and Small Business Markets Are Not Competitive Because It Is Generally Not Economically Efficient to Serve Those Customers Through Self-Provisioned Switching

In setting the maximum number of lines at three, the Commission found that even in those areas where competitors have entered the market with their own switches, to date effective competition has only developed at the medium- and large-sized business level. *Id.*, 291. As the Commission observed, "[c]ommenters in this proceeding generally argue that requesting carriers have deployed switches to serve medium and large business customers and are generally not serving" residential and small business customers. *See id.*, ¶ 291. The Commission agreed, quoting its finding from the *Advanced Services* proceeding that "[t]he local competition that has developed has focused on larger business customers in large cities, not on residential or small business customers." *Id.*, ¶ 291 n.573.

There are two reasons why, with the maximum number of lines set at three, that competition will not spread to the residential and small business markets. First, even where CLECs have deployed switches, it is generally not economically efficient to serve residential and businesses with three lines or fewer through self-provisioned switching. Second, there is no opportunity for non-facilities based CLECs to enter the market through a UNE-Platform strategy because residential and three line or less business customers do not provide a sufficient revenue base on their own to justify competitive entry.

1. Residential and Three Line Business Customers Cannot Be Served Efficiently Through Self-Provisioned Switching

The primary reason that residential and small business customers continue to face a lack of competition even where CLECs have entered a market through facilities-based service is that it is often not economically efficient to serve those customers using the

CLEC's switch and unbundled local loops purchased from the ILEC. As the Commission found, the cost of the switch itself is only one component of the total cost of providing service to a customer through self-provisioned switching coupled with unbundled local loops. In addition to the cost of the switch, the Commission found that collocation and coordinated line cutovers also contribute significantly to the cost of providing service to a customer. *Id.*, ¶¶ 263, 265.

With respect to collocation, the Commission found that "collocation imposes materially greater costs on requesting carriers than the use of the incumbent LEC's switching." *Id.*, ¶ 263. With collocation costs ranging from $15,000 to $508,000 for a single central office, *id.*, the Commission found that the "costs associated with collocation and the revenue opportunities associated with a given wire center may not justify establishing a collocation arrangement with the incumbent LEC in many central offices." *Id.*

Birch's experience comports with the Commission's findings regarding the high costs of collocation. In Missouri, for example, Birch has received quotes for collocation in excess of $150,000 for a single central office. At those rates, it is hard to justify providing switch-based service to lower-volume residential and small business customers.

On top of collocation costs, the coordinated cutover process imposes additional costs on CLECs that connect their own switches to unbundled loops. *Id.*, ¶ 266. Evidence in this proceeding shows that a manual loop and switching port migration costs between $59.91 and $218.62 per unbundled loop. *Id.*, ¶ 266 (citing Letter from Carol Ann Bischoff, Executive Vice President and General Counsel, CompTel).

Unlike the cost of the switch itself, which is a sunk cost once the switch is installed, collocation and cutover costs increase at the margin as additional customers are placed into service. Those costs, especially when coupled with the delays and difficulties inherent in serving a customer through self-provisioned switching and unbundled loops make it very difficult to economically serve smaller customers even where a CLEC has a switch in place and is serving larger customers.

The Commission recognized that this is the case, citing a model submitted by MCI that compares the costs of providing service to residential customers through self-provisioned switched versus unbundled switching. *Id.*, ¶ 82. The model demonstrates that, at least at low market penetration levels, "the costs of collocation would impair a competitive LEC's ability to serve residential customers using its own facilities." *Id.* By contrast, however, MCI's model further demonstrates "that using the incumbent LEC's unbundled network elements, the entrant would be able [to] provide service, even at the same low market-penetration level." *Id.* While the Commission did not find the MCI model dispositive, it recognized that the model "illustrate[s] that a requesting carrier's ability to serve residential and small business customers may be materially diminished without access to the incumbent LEC's network" regardless of whether the requesting carrier is able to provide switch-based service to larger business customers. *Id.*, ¶ 83.

Saying that a switch-based CLEC is unable to address the residential and small business market through unbundled switching is tantamount to saying that it has no way of addressing that market at all. As the Commission has recognized, the cost of self-provisioning loops is prohibitive, *id.*, ¶ at 262, and resale is not an economically viable option. Thus, if the Commission's goal of bringing widespread competition to residential and small business customers is to be realized, it is going to be largely through the vehicle of unbundled switching.

2. The Three Line Maximum Does Not Permit Competitive Entry By Non-Facilities Based Providers

In addition to allowing facilities-based CLECs currently providing service in a market to extend their competitive reach down into the mass market, raising the line cap will also encourage new market entry by competitive providers. With the current three-line maximum, no CLEC with a non-facilities based strategy can realistically be expected to enter a top 50 MSA market and serve customers in density zone 1. The evidence at least thus far is that the residential and "micro" business markets are not sufficient on their own to support competitive entry. Raising the line cap will allow CLECs to avail themselves of the greater revenue potential of serving small businesses with more than four lines. In addition, CLECs will be able to spread common marketing, overhead, and sales force costs over a greater number of customers. Thus, CLECs will realistically be able to enter markets even where they do not intend initially to install their own switch.

B. There Is No Basis for the Commission's Selection of the Three Line Maximum

While the Commission is correct that competition is not reaching residential and small business customers, the Commission's remedy—the carve out from the switching exception for end users with three lines or less—is not well-tailored to addressing the problem. While the three line maximum may permit CLECs to serve some residences and the smallest of the small, or "micro," business customers, it does nothing to address the dearth of competition for small businesses with telecommunications needs greater than a household but which are not large enough users to justify service through self-provisioned switching.

Significantly, the Commission offered no record support for its selection of three or fewer lines as the maximum number of lines that can be provided through unbundled switching. Rather, the Commission arbitrarily selected three lines as the cap because "any business that has three or fewer lines is likely to share more characteristics of the mass market customer than a medium and large business." *Id.*, ¶ 293. Thus—and here the Commission acknowledged it relied not on any evidence in the record but solely on its "expert judgment"—the Commission found that the three line maximum "reasonably captures the division between the mass market . . . and the medium and large business market." *Id.*, ¶ 294.[2]

There is nothing to suggest, however, that the small businesses that are currently not receiving the benefits of competition are limited to the "micro" businesses that "use the same number of lines as many residential subscribers and purchase similar volumes and types of telecommunications services." *Id.*, ¶ 293. In fact, Birch's experience is that it in many instances it does not become economical to serve a customer through self-provisioned switching until the customer reaches the 10-12 line size. It is only at that point that the economies of scale begin to justify the expenses associated with switch-based service.

small

In any case, even at the residential level, the three-line maximum may not be high to ensure that the market is open to effective competition. It is increasingly common for a residence to have four or more lines. Often parents and children will each have their own line and in addition, the home may have one or more dedicated lines for Internet

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2 In another context, the Commission exercised its judgment and determined that 20 lines represented the demarcation between residential and small business customers on the one hand and large business customers on the other. In the *Computer III* Remand Proceeding, the Commission held that BOCs could use customer proprietary network information without prior approval in marketing enhanced services to customers with 20 lines or less, but required prior approval to do so in marketing to customers with more than 20 lines. *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, Report and Order*, 6 FCC Rcd 7571, 7609 (1991). The Commission based that holding on its finding that the market for "smaller businesses" of 20 lines or less was less competitive and needed more encouragement than the larger business market. *Id.* at 7609-7610.

access and/or fax machines. In addition, as Commissioner Ness recognized in her Separate Statement, "[t]here are instances where multiple families live together in a single residence, or students—all of who order their own telephone lines—share accommodations." Separate Statement of Commissioner Susan Ness, 2-3. Commissioner Ness is correct that "[s]urely these instances meet the definition of "mass market" and should not be excluded from the exception." *Id.*, 3.

C. The Cut-off Should Be Set at the DS-1 Level

Birch supports CompTel's proposal that the cut-off be set at the DS-1 level, for the reasons set forth in CompTel's Petition for Reconsideration. At a minimum, the cut-off should be set at no less than 10-12 lines, which in Birch's experience is roughly the point at which it becomes cost effective to serve an end user through DS-1 facilities.

II. END USERS INITIALLY QUALIFYING TO BE SERVED THROUGH UNBUNDLED SWITCHING SHOULD BE GRANDFATHERED IF THEY GROW TO EXCEED THE MAXIMUM NUMBER OF LINES

The Commission should make clear that CLECs are not required to cease providing unbundled switching to a particular customer if, after the CLEC has placed the customer into service, the customer grows to the point where its needs exceed the line cap. Absent such a clarification, the incumbent LECs could argue that they can discontinue providing unbundled switching which in turn would force the CLEC to cease service to the customer.[3] Such a result would in effect penalize CLEC customers for being successful and would be directly counter to the Commission's stated goal of ensuring that small businesses are able to avail themselves of the benefits of competition.

[3] Even if the cap is set high enough so that switch-based service is an option, the costs of, and difficulties inherent in, transitioning the customer from unbundled switching to facilities-based service could be prohibitive.

CONCLUSION

The Commission should (1) increase the cap on the number of lines that can be provided using unbundled switching in accordance with these comments and (2) clarify that the line cap only applies at the time a CLEC initially puts a customer into service and does not preclude a CLEC from continuing to serve a customer through unbundled switching if the customer's needs grow beyond the cap.

Respectfully submitted,

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By: /s/ Jacob S. Farber
Albert H. Kramer
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February 17, 2000

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98

OPPOSITION AND COMMENTS OF BIRCH TELECOM, INC. ON PETITIONS FOR RECONSIDERATION

Birch Telecom, Inc. ("Birch") hereby files the following comments on the petitions for reconsideration filed by various parties of the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, released November 5, 1999, in the above-captioned docket (the "*Order*").

INTRODUCTION

In its own petition for reconsideration, Birch demonstrated that the availability of unbundled switching is critical to the development of competition in the residential and small business markets. Birch therefore asked the Commission to raise the maximum number of lines that can be provided through unbundled switching in zone 1 of the Top 50 MSAs from the current maximum of three to the DS-1 level. Several other parties also filed petitions for reconsideration asking the Commission to relax the restrictions on the availability of unbundled switching. Sprint Corporation ("Sprint"), the Competitive Telecommunications Association ("CompTel"), and MCI WorldCom, Inc. ("MCI") all, like Birch, asked the Commission to increase the line maximum to the DS-1 level or higher. AT&T Corp. ("AT&T") also asked that the maximum number of lines be increased, but sought an increase to only an eight line maximum.

The only petitioner to suggest a tightening of the restrictions on the availability of unbundled switching was Bell Atlantic. Under Bell Atlantic's proposal, what are now limited exemptions would expand to essentially swallow the general rule that switching must be unbundled. Bell Atlantic asked the Commission to eliminate the requirement that incumbent LECs must provide unbundled switching to CLECs serving customers with three lines or less in zone 1 of the top 50 MSAs (where incumbent LECs are currently not otherwise required to provide switching). Bell Atlantic Pet. at 11. Bell Atlantic also urged the Commission to expand the geographic scope of the switching exemption from zone 1 of the top 50 MSAs to every rate center where even a single competitor has installed a switch. *Id.* at 6-7. Finally, Bell Atlantic requested that the Commission not require incumbent LECs to provide the enhanced extended link ("EEL") as a condition for not providing unbundled switching. *Id.* at 1. If the Commission's goal is to encourage widespread competition in the residential and small business markets, Bell Atlantic's petition must be denied.

I. The Commission Should Increase, Not Decrease, the Current Three-Line Maximum

The Commission's current rules provide that in zone 1 of the top 50 MSAs, incumbent LECs are required to provide unbundled switching to competitors serving customers with three lines or less. Bell Atlantic proposes that the Commission eliminate this requirement. According to Bell Atlantic, "there is no reason for the Commission to limit switch unbundling relief to business customers with four or more lines." Bell Atlantic Pet. at 11. In Bell Atlantic's view, "[o]nce a carrier has invested in a switch, it can use that switch to serve single line customers just as easily as it can use that switch to serve customers with four or more lines. There is nothing in the record that demonstrates competing carriers are impaired when they attempt to use their own switch to serve a customer with one, two, or three lines." *Id.*

Bell Atlantic is simply wrong. As the Commission found, "the ability of one or more competitors to serve certain customers in a particular market is not dispositive of whether competitive LECs without unbundled access to the incumbent LEC's facilities are able to compete for other customers in the same market . . . ." *Order*, ¶ 54. While the existence of a competitor's switch may evidence that it is practical and economical to serve high-volume business customers in that market (and thus that competitors are not impaired in serving those customers), residential customers and small businesses are an altogether different matter. As the Commission recognized, with respect to smaller customers, "the delays and costs associated with self-provisioning [switching] will preclude those same competitors, or others, from assuming the risk of entry, unless they can purchase unbundled elements from the incumbent." *Id.* The Commission therefore concluded that "without access to unbundled local circuit switching, requesting carriers are impaired in their ability to serve the mass market." *Order*, ¶ 291.

The Commission's finding that there is a customer size below which it is uneconomical to serve a customer through self-provisioned switching, *even where the switch is already in place*, is absolutely correct. As Birch and several other parties demonstrated, there is a number of lines below which serving a customer through self-provisioned switching is not economically efficient. On top of the issue of costs, providing service to a customer through self-provisioned switching exposes a CLEC to the operational difficulties and delays inherent in the hot cut-over process. As every CLEC industry petitioner points out, incumbent LECs are simply unable to provision, and coordinate the conversion of, mass market levels of unbundled loops in a timely manner and without the potential for significant disruption of service. For these reasons, it is clear that there is a point below which competitors cannot viably serve customers through self-provisioned switching.

The only question is at what point the cut-off should be set. Birch, along with CompTel and MCI supports, setting the cut-off at the DS-1 level. A DS-1 facility allows a competitor to avoid the cumbersome and error-prone manual hot-cut process for individual loops that the Commission has found to impair the ability of competitors to compete effectively. Setting the maximum at the DS-1 level also has the benefit of being straightforward. The Commission will not have to involve itself in the process of determining at precisely what number of lines various competitors might opt to provision a DS-1 line instead.

Sprint suggests setting the maximum even higher, at 39 lines. Sprint points out that many small businesses use an average of 22 and 56 lines and 39 is the midpoint of that range. Sprint Pet. at 7-9.[1]

AT&T, for its part, suggests using 8 lines as the cut-off. According to AT&T, it is at that point that it theoretically becomes "economically feasible to bypass the individual loop hot-cut provisioning process" and use "DSL technology to efficiently aggregate loops for customers." AT&T Pet. at 16. While Birch fully supports the logic of AT&T's position, the eight line cross-over point proposed by AT&T is not high enough. As AT&T points out, the eight line cross-over assumes the latest generation of DSL technology, which is only now beginning to become available. Most competitors instead aggregate multiple loops to a customer premises using a DS-1 line. AT&T's experience is that the cross-over point for DS-1 lines occurs at 16 lines, not 8 lines. To the extent that the

[1] Sprint also suggests the use of 15 key trunks or more than 50 Centrex lines.

Commission is unwilling to use the DS-1 level as the cut-off, it may be appropriate to use 16 line as the maximum.

In sum, while the various petitioners addressing this issue suggested different crossover points, it is abundantly clear that the current three-line maximum is far too low and has no record support. The Commission must raise the maximum to take into account the market realities reflected in the record.

In addition to allowing facilities-based CLECs currently providing service in a market to extend their competitive reach down into the mass market, raising the line maximum will also encourage new market entry by competitive providers. With the current three-line maximum, no CLEC with a non-facilities based strategy can realistically be expected to enter a top 50 MSA market and serve customers in zone 1. The evidence at least thus far is that the residential and very small business markets are not sufficient on their own to support competitive entry. Raising the line maximum will allow CLECs to avail themselves of the greater revenue potential of serving small businesses with more than four lines. Thus, CLECs will realistically be able to enter markets they otherwise would have been forced to bypass.

II. The Commission Should Not Expand the Geographic Scope of the Switching Exemption

The Commission should reject Bell Atlantic's request that the geographic scope of the switching exemption be expanded from zone 1 of the top 50 MSAs to anywhere that a competitor has installed a switch. Several parties, Bell Atlantic among them, suggested exactly this same approach to the impairment standard in their pre-*Order* comments. As the Commission noted in the *Order*, "[c]ertain incumbent LECs . . . argue that the presence of one competitor's switch and collocation in a given market is dispositive of whether requesting carriers generally will be impaired without access to unbundled switching." *Order*, ¶ 256. The Commission rejected this view, finding that "switch unbundling cannot turn on whether a single carrier has self-provisioned switching." *Id.* According to the Commission, existence of a single, collocated carrier using self-provisioned switching "does not conclusively demonstrate that a variety of carriers can self-provision switches without significant cost or other impediments that diminish a collocating carrier's ability to provide the services that it seeks to offer" *Id.*

Bell Atlantic's fails to offer any new argument that would support a reversal of the Commission's decision on this issue in the *Order*. The Commission should deny Bell Atlantic's petition as nothing more than a rehashing of previously raised and rejected arguments. *See, e.g. WWIZ, Inc.*, 37 FCC 685 (1964) (it is well-established that reconsideration will not be granted where the Commission has once debated and spoken).

III. The Commission Should Retain the Requirement that the EEL Be Made Available Where Incumbent LECs Do Not Provide Unbundled Switching

Bell Atlantic requests that the Commission reconsider its decision to require that incumbent LECs must make the EEL available as a precondition for relief from unbundled switching. The Commission should deny this request.

The Commission correctly concluded in the *Order* that, where unbundled switching is not available, competitors will be impaired unless they are provided with the EEL. The Commission found that the EEL "reduce[s] significantly the cost of self-provisioning a switch in the initial phase of an entry strategy" by reducing or eliminating up-front collocation costs, which can be prohibitively expensive. *Order*, ¶ 288-89.

Bell Atlantic challenges this finding on the grounds that "collocation is not part of the Act's impairment test for unbundling." Bell Atlantic Pet. at 4. The Commission, however, never ruled that collocation *per se* was part of the impairment analysis. Instead, the Commission held that, absent the availability of the EEL, initial collocation costs would be so expensive as to make self-provisioned switching prohibitive.

The Commission's reasoning is sound. If a CLEC does not have access to the EEL, it will be forced to collocate in every central office where the CLEC wishes to serve even a single customer. The record reflects that costs for a single collocation range from $15,000 to $508,000. *Order*, ¶ 261. For a CLEC that intends to serve the mass market, where customers are low-volume and widely-dispersed, it would be next to impossible to achieve sufficient market penetration quickly enough to recover those costs. Where a CLEC cannot economically serve its target customer base, there can be no question that it is impaired with respect to that segment of the market.

As for Bell Atlantic's argument that the Commission lacks the authority to order the EEL where the component UNEs are not currently combined, the Supreme Court's decision in *AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999) makes clear that this is not the case. Both Section 51.315(b) of the Commission's rules, which requires ILECs to provide UNE combinations that the ILEC currently combines, and Sections 51.315(c)-(f), which require incumbent LECs to combine previously uncombined elements, were vacated by the Eighth Circuit. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Court, however, in reversing the Eighth Circuit with respect to Section 51.315(b), held that the FCC's interpretation of Section 251(c)(3) was "entirely rationale, finding its basis in § 251(c)(3)'s nondiscrimination requirement." *AT&T Corp.*, 119 S.Ct. at 737.

While Sections 51.315(c)-(f) were not before the Supreme Court, its logic in finding that Section 251(c)(3) provides the authority for Section 51.315(b) clearly extends to Sections 51.315(c)-(f) as well. The same nondiscrimination requirement that undergirds Section 51.315(b)'s requirement that combined elements cannot be separated also underlies the requirement that incumbent LECs must combine elements for requesting carriers. *See Local Competition Order*, ¶ 294 ("we conclude that section 251(c)(3) should be read to require incumbent LECs to combine elements requested by carriers").

The United States Court of Appeals for the Ninth Circuit has recently confirmed that this is the case in *U S West Communications v. MFS Intelnet, Inc*, No. 98-35146 (October 8, 1999). In that case, the Ninth Circuit upheld the Washington Utilities and Transportation Commission's decision in an arbitration proceeding to require U S West to combine UNEs on behalf of MFS Intelnet. In so holding, the court specifically found the Supreme Court's reasoning in *AT&T* makes clear that not only does the nondiscrimination provision of Section 251(c)(3) prohibit incumbent LECs from separating existing combinations, it is also the basis for requiring incumbent LECs to combine UNEs upon request. *U S West*, slip op. at 21. The Ninth Circuit thus affirmed the Washington Commission, holding that it "necessarily follows from [the Supreme Court's decision in *AT&T*] that requiring U S West to combined unbundled network elements is not inconsistent with the Act . . . ." *Id.*

CONCLUSION

The Commission should deny Bell Atlantic's petition for reconsideration for the reasons shown above. The Commission should instead grant Birch's petition for reconsideration and (1) increase the cap on the number of lines that can be provided using unbundled switching to the DS-1 level or higher and (2) clarify that the line cap only applies at the time a CLEC initially puts a customer into service and does not preclude a CLEC from continuing to serve a customer through unbundled switching if the customer's needs grow beyond the cap.

Respectfully submitted,

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By: /s/ Jacob S. Farber
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March 22, 2000

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2000, I caused a copy of the foregoing Opposition and Comments of Birch Telecom, Inc. on Petitions for Reconsideration to be sent by U.S. mail, first class postage, pre-paid to the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY OF BIRCH TELECOM, INC. TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION

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REPLY OF BIRCH TELECOM, INC. TO OPPOSITIONS TO ITS PETITION FOR RECONSIDERATION

Birch Telecom, Inc. ("Birch") hereby replies to the various oppositions to its petition for reconsideration ("Petition") of the *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, released November 5, 1999, in the above-captioned docket (the "*Order*").

INTRODUCTION AND SUMMARY

In its Petition, Birch demonstrated that the availability of unbundled switching is critical to the development of competition in the residential and small business markets. Birch further demonstrated that because of collocation costs and the costs and difficulties inherent in the coordinated cutover process, even where a CLEC has a switch in place, it is impaired in its ability to serve smaller customers through self-provisioned switching. Birch therefore asked the Commission to raise the maximum number of lines that can be provided through unbundled switching in zone 1 of the Top 50 MSAs from the current maximum of three to the DS-1 level. Birch demonstrated that the DS-1 level is the point